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July 20, 2005

VIA MESSENGER

Mr. John H. Robertus
Executive Officer
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-430

Subject: TENTATIVE ORDER NO. R9-2005-0136; NPDES PERMIT NO. CA0107433;
WASTE DISCHARGE REQUIREMENTS FOR THE CITY OF OCEANSIDE,
SAN LUIS REY AND LA SALINA WASTEWATER TREATMENT PLANTS
AND BRACKISH GROUNDWATER DESALINATION FACILITY;
DISCHARGE TO THE PACIFIC OCEAN VIA THE OCEANSIDE OUTFALL

Mr. John H. Robertus:

On May 9, 2005, the California Regional Water Quality Control Board, San Diego Region ("Regional Board") issued the above-captioned tentative permit for discharges from the City of Oceanside's ("City") wastewater treatment plant ("Revised Permit"). Contained in the Revised Permit is an effluent limitation and monitoring requirement for acute toxicity. We represent Hydranautics, a membrane manufacturing firm which discharges to the City's wastewater treatment plant. Hydranautics believes this effluent limitation is unnecessary, redundant, and has no basis in the Clean Water Act or the Porter-Cologne Water Quality Control Act. To require it will divert public funds from other important civic projects by forcing the City expend funds on testing Hydranautics believes to be of little or no environmental benefit. The information that Hydranautics believes warrants the elimination of this effluent limitation from the Revised Permit is explained in the enclosed specific comments and its attachments.

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ITEM 11
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Hydranautics appreciates the Regional Board's continuance of the public hearing on the Revised Permit so that it and the City could address this and other issues with your staff. Hydranautics looks forward to discussing this issue with both the City and your staff prior to the public hearing on the Revised Permit. If you have any questions or comments, please contact me at (619) 238-2876.

Very truly yours,

A handwritten signature in cursive script that reads "Kelly Richardson".

Kelly E. Richardson
of LATHAM & WATKINS LLP

Enclosures

cc: John Minan, Chairman

Specific Comments on Tentative Order No. R9-2005-0136

I. Based On Plant's Dilution Factors, Only Chronic Toxicity Testing Should Be Required

Acute toxicity testing is not required under California law or regulations. The 2001/2005 California Ocean Plan ("Ocean Plan") assumes that there is no reasonable potential for acute toxicity excursions at the City's dilution factors. Chapter III, Section C, (3)(c) of the Ocean Plan states:

- (1) Dischargers shall conduct acute toxicity testing if the minimum initial dilution of the effluent is greater than 1,000:1 at the edge of the mixing zone.
- (2) Dischargers shall conduct either acute or chronic toxicity testing if the minimum initial dilution ranges from 350:1 to 1,000:1 depending on the specific discharge conditions. The [Regional Board] shall make this determination.
- (3) Dischargers shall conduct chronic toxicity testing for ocean waste discharges with minimum initial dilution factors ranging from 100:1 to 350:1. The [Regional Boards] may require that acute toxicity testing be conducted in addition to chronic as necessary for the protection of beneficial uses of ocean waters.
- (4) Dischargers shall conduct chronic toxicity testing if the minimum initial dilution of the effluent falls below 100:1 at the edge of the mixing zone.

Dilution factors at the Plant have generally been in the 80:1 to 85:1 range. The Regional Board determined the minimum initial dilution factor to be 87:1 for the discharge of up to 29.055 MGD of effluent from the Plant. Tentative Order, F-6. Because the minimum initial dilution is below 100:1, toxicity testing requirements are governed by section (4) above, and the Regional Board may only require the chronic toxicity test, not the acute toxicity test.

Acute toxicity testing at this dilution factor is also not required under federal criteria. The United States Environmental Protection Agency ("EPA") recommends that a discharger conduct only chronic toxicity testing if the dilution of the effluent falls below 100:1 at the edge of the mixing zone. EPA, Technical Support Document for Water Quality-based Toxics Control (March 1991), 58.

Therefore, under both federal and state guidelines based on initial dilution, chronic toxicity testing, rather than acute toxicity testing, is required.

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II. Reasonable Potential Analysis Calculation from April 2005 Amendment to 2001/2005 Ocean Plan Determines Effluent Limitation Not Required for Acute Toxicity

Not only is a water quality-based effluent limitation for acute toxicity not supported by dilution factors, the Reasonable Potential Analysis also counsels that an effluent limitation is not required for acute toxicity.

In April 2005, the State Water Resources Control Board ("SWRCB") amended the Ocean Plan to include a procedure Regional Boards should use to determine whether Table B pollutants have a reasonable potential to exceed water quality objectives, and whether a water quality-based effluent limitation is needed for individual pollutants. Acute toxicity is a Table B Pollutant. Appendix VI of the revised Ocean Plan outlines the procedure for evaluating whether there is a reasonable potential to exceed water quality objectives. The SWRCB website also provides a link to the Ocean Plan Reasonable Potential Analysis Calculator ("RPCalc") which runs the logarithmic equation described in Appendix VI, and generates a Reasonable Potential Analysis graph detailing the outcome of the calculation, including a conclusion whether testing is required for that pollutant.

The current Plant permit requires acute toxicity testing of the City's effluent using fresh water species, despite the fact that the Plant discharges into the ocean. This permit contains instantaneous maximum, weekly average, and 30-day average limits. The Revised Permit, based on the new 2001/2005 Ocean Plan including the April 2005 amendment, requires that marine species be used for acute toxicity testing and contains a daily maximum limit for acute toxicity.

Hydranautics' consultant analyzed historical plant effluent data and the Revised Permit acute toxicity limit using RPCalc. Using data from the City, the program determined that the Reasonable Potential Analysis outcome was Endpoint 2: "An effluent limitation is not required for the pollutant." Therefore, there is not a reasonable potential for the discharge to exceed the Ocean Plan's water quality objective for acute toxicity. This finding was consistent whether the data used was from January 1999 through December 2002 (data set used by the Regional Board in their analysis), January 1999 through June 2005 (all available data), or July 2003 through June 2005 (the last three years of data). The data used to run these calculations is included in Attachment "A," and the graph generated by the RPCalc showing this result for all available data is provided in Attachment "B."

Thus, according to both the dilution factors and the revised Ocean Plan's Reasonable Potential Analysis, an acute toxicity effluent limitation should not be included in the Revised Permit; rather, the Revised Permit should require chronic toxicity testing.

III. Additional Reasonable Potential Analysis Factors in the Ocean Plan Further Indicate that an Acute Toxicity Effluent Limitation Is Not Required

The SWRCB provided the Regional Boards with a list of factors the Regional Boards should use to determine, based on their best professional judgment, whether an effluent

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limitation is needed for a Table B pollutant if the Regional Boards had no data or insufficient data to run the Reasonable Potential Analysis calculation.

Appendix VI, Step 13 of the revised Ocean Plan states that information which may be used to conduct a Reasonable Potential Analysis based on Best Professional Judgment include: the facility type; the discharge type; solids loading analysis; lack of dilution; history of compliance problems; potential toxic impact of discharge; fish tissue residue data; water quality and beneficial uses of the receiving water; CWA 303(d) listing for the pollutant, the presence of endangered or threatened species or critical habitat, and other information." All relevant factors suggest that an acute toxicity effluent limitation need not be developed. Each of these factors is discussed below.

A. Facility Type

The Plant is a publicly owned treatment works owned by the City, and has been in operation for many years. Hydranautics shares the Regional Board's commitment to the environment and to water quality in California. Because of this commitment to the environment, Hydranautics appreciates the importance of compliance with environmental permits, including the Revised Permit.

However, in this instance, Hydranautics feels that an acute toxicity effluent limitation is unnecessary. To require it will reduce the City's ability to provide funding to other important civic projects by forcing the City to expend funds on testing that is not required based on the Plant's dilution factors, the Reasonable Potential Analysis Calculation, and other factors discussed below. Further, the chronic toxicity test is far more stringent than (and indeed, largely subsumes) the acute toxicity test.

B. Discharge Type

The discharge type has not materially changed since the last NPDES permit was issued for the Plant.

C. Solids Loading Analysis

This is not a sediment or solids related issue; thus, this factor is not applicable.

D. Lack of Dilution

As discussed above, there is an 87:1 dilution factor at the Plant. Under both state and federal regulations, there is no reasonable potential for acute toxicity excursions at this dilution factor. Also, as discussed above, Chapter III, Section C of the Ocean Plan states:

- (1) Dischargers shall conduct acute toxicity testing if the minimum initial dilution of the effluent is greater than 1,000:1 at the edge of the mixing zone.

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- (2) Dischargers shall conduct either acute or chronic toxicity testing if the minimum initial dilution ranges from 350:1 to 1,000:1 depending on the specific discharge conditions. The [Regional Board] shall make this determination.
- (3) Dischargers shall conduct chronic toxicity testing for ocean waste discharges with minimum initial dilution factors ranging from 100:1 to 350:1. The [Regional Boards] may require that acute toxicity testing be conducted in addition to chronic as necessary for the protection of beneficial uses of ocean waters.
- (4) Dischargers shall conduct chronic toxicity testing if the minimum initial dilution of the effluent falls below 100:1 at the edge of the mixing zone.

Dilution factors at the Plant have generally been in the 80:1 to 85:1 range. The Regional Board determined the minimum initial dilution factor to be 87:1 for the discharge of up to 29.055 MGD of effluent from the Plant. Tentative Order, F-6. Therefore, the Regional Board should apply only the chronic toxicity test to the Plant effluent.

Acute toxicity testing at this dilution factor is also not required under federal criteria. The EPA recommends that a discharger conduct only chronic toxicity testing if the dilution of the effluent falls below 100:1 at the edge of the mixing zone. EPA, Technical Support Document for Water Quality-based Toxics Control (March 1991), 58.

Hence, this factor dictates that chronic toxicity testing should be required rather than acute.

E. History of Compliance Problems

The Plant's few past exceedances of the acute toxicity limits based on the 1997 Ocean Plan are historical, irrelevant, and cannot suggest a "reasonable potential" that the City will fail to meet the 2001 Ocean Plan acute toxicity water quality objectives.

The 1997 Ocean Plan was replaced by the 2001 Ocean Plan. Among other revisions, the 2001 Ocean Plan replaced the acute toxicity effluent limitation with an acute toxicity water quality objective. The state found, and EPA agreed, that this methodology was more reflective of actual conditions in the ocean, whereas the previous testing methodology had been artificial.

Under the 1997 Ocean Plan, the acute toxicity effluent limitation was a measure of toxicity at the end of the pipe. Freshwater test species were used. The 2001/2005 test methodology utilizes a receiving water objective, intended to assess acute toxicity impacts of discharges to the Pacific Ocean using marine test species. The purpose of this change was to "properly evaluate effects of the discharge upon the receiving water." Final Functional

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Equivalent Document, Sept 1, 2000, 17 ("FFED"). The old test method was replaced in part because the SWRCB recognized that it overstated the impacts of ammonia. FFED, 11.

The change to acute toxicity testing in the 2001 Ocean Plan was a complete overhaul of the testing methodology. Because the tests are materially different, the test results of one cannot be used to accurately predict the test results of the other.

In early 2003, over a brief period, the Plant exceeded the acute toxicity tests on only two occasions. The City attributed the excursions to ammonia. During this time and since, the Plant effluent has passed all chronic toxicity tests. Typical ammonia concentration in the City's discharge is less than half the total limit and is significantly below the Ocean Plan's ammonia toxicity threshold. Freshwater species are more susceptible to ammonia than are marine species. Thus, historical exceedances cited by Regional Board were based on a more susceptible species than the current test utilizes, and are not indicative of the likelihood of meeting the current limit based on marine species (which is reasonable because the present discharge is to a marine environment, not a freshwater environment).

These historical exceedances are therefore insufficient to create a "reasonable potential" that the City will exceed water quality objectives for acute toxicity. Acute toxicity has not been exceeded under the current permit for two years. Even then, those exceedances were based on the more susceptible freshwater species, and were likely caused by ammonia, which essentially has been found to create false positives for acute toxicity where ammonia is present. Finally, as discussed below, the chronic toxicity testing the Plant will be instituting is more stringent and largely subsumes acute toxicity testing.

F. Potential Toxic Impact of Discharge

Not setting effluent limitations for acute toxicity will not result in the discharge having a toxic impact. The purpose of the 2001/2005 Ocean Plan amendments and revised test methodology was to "properly evaluate effects of the discharge upon the receiving water." FFED, 17. The SWRCB found that this new methodology was more reflective of actual conditions in the ocean, whereas the previous testing methodology had been artificial.

Further, the old test method was replaced in part because the SWRCB recognized that it overstated the impacts of ammonia—suggesting that a discharge would be toxic when no such toxicity actually would exist in the marine environment where the discharge occurs. FFED, 11. The City has concluded that the few acute toxicity tests it failed under the 1997 Ocean Plan method likely failed due to ammonia. The City's previous permit had a discharge limit for ammonia of 50 mg/d. By definition, the City's calculated ammonia limit after dilution is protective of the marine environment. The typical ammonia concentration in the City's discharge is 19-25 mg/L, less than half the total limit.

G. Fish Tissue Residue Data

Fish Tissue Residue Data is irrelevant for acute toxicity.

H. *Water Quality and Beneficial Uses of the Receiving Water and CWA 303(d) Listing for the Pollutant*

There are specified beneficial uses of the Pacific Ocean, and the receiving waters in the vicinity of the Plant's discharge point are not included on the current 303(d) list.

I. *Presence of Endangered or Threatened Species or Critical Habitat*

There are no endangered or threatened species or critical habitat at the outfall of the Plant identified in the Revised Permit

J. *Other Information*

a. Regional Board Must Consider Economic Effect on City Before Requiring Acute Toxicity Effluent Limitation

If the Regional Board was inclined to impose an acute toxicity effluent limitation, which we believe they cannot reasonably do, the Regional Board failed to take into account the economic effect this would have on the City, a factor which they are required to consider under a recent California Supreme Court ruling.

City of Burbank v. State Water Resources Control Board held that under state law a Regional Board must take into account economic considerations (including the cost of compliance) when adopting a discharge standard that exceeds the applicable federal standard under section 13263 and 13241 of the Porter-Cologne Act. City of Burbank v. State Water Resources Control Board, ___ Cal.4th ___ BS060957 (April 4, 2005). As a result, the Regional Boards are obligated to consider the costs of compliance when deciding whether to establish requirements that are more stringent than federal requirements. This is the case irrespective of whether those more stringent requirements are narrative or numeric.

Requiring the acute toxicity effluent limitation is more stringent than what is required by the federal government. EPA recommends that a discharger conduct chronic toxicity testing, not acute toxicity testing, if the dilution of the effluent falls below 100:1 at the edge of the mixing zone. United States Environmental Protection Agency, Technical Support Document for Water Quality-based Toxics Control (March 1991), 58.

Performing acute toxicity would be extraordinarily expensive for the City and is unnecessary as the SWRCB has determined that the 2001 Ocean Plan acute toxicity testing standards are more protective of beneficial uses of the ocean than were the 1997 standards since the 2001 standards are more reflective of actual ocean conditions and less artificial than the 1997 standards. Further, the SWRCB provided the Regional Boards with a calculation to determine whether or not a reasonable potential exists, and as noted above, the outcome of that calculation in this case is that an acute toxicity effluent limitation is unnecessary.

b. Requiring Both Acute and Chronic Testing for the Plant is Redundant

Chronic toxicity testing is universally viewed as the more stringent of the two toxicity tests. The City consistently passes chronic toxicity testing. The City allegedly believes the only reason it has very occasionally failed acute toxicity testing is because of ammonia. The City is not exceeding the ammonia levels in its permit.

Further, requiring both acute and chronic toxicity testing in this case is redundant. The chronic toxicity testing will provide environmentally protective limitations on the Plant's discharge.

IV. Removing Acute Toxicity Testing Requirement Will Not Violate the Anti-Degradation Policy

Removing the requirement of acute toxicity testing from the Revised Permit will not violate the anti-degradation policy. Anti-Degradation requirements are outlined in 40 C.F.R. §131.12. Federal anti-degradation requirements are triggered *only by a lowering of water quality*. As noted above, federal and state dilution ratios and the SWRCB's RPCalc all indicate that an effluent limitation for acute toxicity is unnecessary. The replacement of the 1997 technology-based acute toxicity effluent limitations with an acute toxicity water quality objective does not result in a lowering of water quality. The change was made because the state felt, and the federal government agreed, that it was more reflective of actual ocean conditions. FFED, 26.

V. Removing Acute Toxicity Test Will Not Violate Anti-Backsliding

The SWRCB replaced technology-based acute toxicity limitations with, assuming reasonable potential, water quality based limits. SWRCB has explicitly stated, "This approach is not subject to anti-backsliding restrictions." FFED, 27. Further, EPA approved the 2001/2005 Ocean Plan, based on [its] finding that the approved amendments are consistent with the requirements of the Clean Water Act and EPA's regulations at 40 CFR 131.5 and 131.6.

VI. Conclusion

In light of the numerous factors discussed herein, Hydranautics requests that the acute toxicity effluent limit be removed from the Revised Permit, and that chronic toxicity effluent limits remain in the permit. Hydranautics requests an opportunity to meet with Regional Board staff to discuss the issues addressed in this letter. Please advise as to the Regional Board's availability for such a meeting.

Oceanside Ocean Outfall - acute toxicity (TUa)

1999	annual	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
average	0.976	1.22	0.765	1.33	1.27	1.20	0.999	0.999	0.765	0.765	0.869	0.765	0.765
maximum	1.330	1.22	0.765	1.33	1.27	1.20	0.999	0.999	0.765	0.765	0.869	0.765	0.765
minimum	0.765	1.22	0.765	1.33	1.27	1.20	0.999	0.999	0.765	0.765	0.869	0.765	0.765
violations	0	0	0	0	0	0	0	0	0	0	0	0	0

Oceanside Ocean Outfall - acute toxicity (TUa)

2000	annual	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
average	1.116	1.4	1.27	0.942	0.999	0.765	0.999	1.339	1.45	0.765	1.08	1.05	1.33
maximum	1.450	1.4	1.27	0.942	0.999	0.765	0.999	1.339	1.45	0.765	1.08	1.05	1.33
minimum	0.765	1.4	1.27	0.942	0.999	0.765	0.999	1.339	1.45	0.765	1.08	1.05	1.33
violations	0	0	0	0	0	0	0	0	0	0	0	0	0

Oceanside Ocean Outfall - acute toxicity (TUa)

2001	annual	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
average	1.05	1.19	1.18	0.87	1.15	1.08	1.36	0.59	1.25	0.87	0.59	1.16	1.36
maximum	1.36	1.19	1.18	0.87	1.15	1.08	1.36	0.59	1.25	0.87	0.59	1.16	1.36
minimum	0.59	1.19	1.18	0.87	1.15	1.08	1.36	0.59	1.25	0.87	0.59	1.16	1.36
violations	0	0	0	0	0	0	0	0	0	0	0	0	0

Oceanside Ocean Outfall - acute toxicity (TUa)

2002	annual	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
average	1.26	1.39	1.36	1.45	1.45	1.45	1.12	1.33	1.43	0.77	1.12	0.77	1.45
maximum	1.45	1.39	1.36	1.45	1.45	1.45	1.24	1.33	1.43	0.77	1.12	0.77	1.45
minimum	0.77	1.39	1.36	1.45	1.45	1.45	1.00	1.33	1.43	0.77	1.12	0.77	1.45
violations	0	0	0	0	0	0	0	0	0	0	0	0	0

DSCR	CDAT	SIDN	Toxicity - TUa
Outfall composite	1/1/1999		1.220
Outfall composite	2/1/1999		0.765
Outfall composite	3/1/1999		1.330
Outfall composite	4/1/1999		1.270

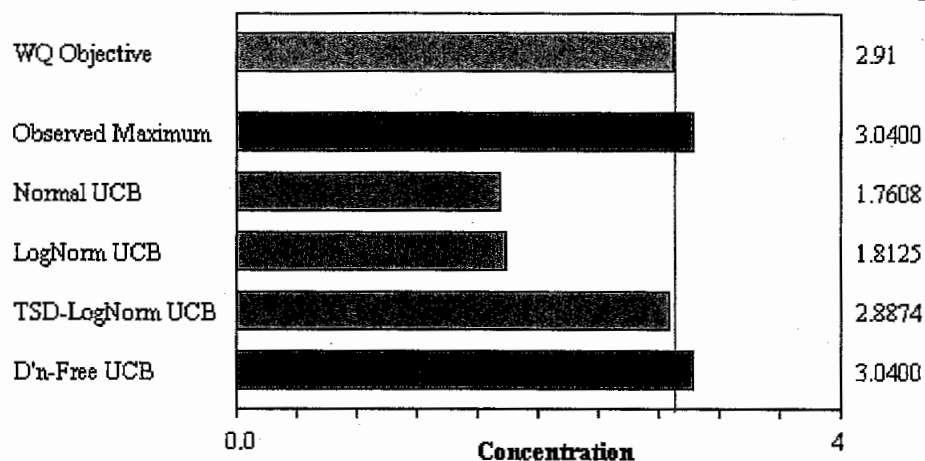
Outfall composite	5/1/1999	1.200
Outfall composite	6/1/1999	0.999
Outfall composite	7/1/1999	0.999
Outfall composite	8/1/1999	0.765
Outfall composite	9/1/1999	0.765
Outfall composite	10/1/1999	0.869
Outfall composite	11/1/1999	0.765
Outfall composite	12/1/1999	0.765
Outfall composite	1/1/2000	1.400
Outfall composite	2/1/2000	1.270
Outfall composite	3/1/2000	0.942
Outfall composite	4/1/2000	0.999
Outfall composite	5/1/2000	0.765
Outfall composite	6/1/2000	0.999
Outfall composite	7/1/2000	1.339
Outfall composite	8/1/2000	1.450
Outfall composite	9/1/2000	0.765
Outfall composite	10/1/2000	1.080
Outfall composite	11/1/2000	1.050
Outfall composite	12/1/2000	1.330
Outfall composite	1/1/2001	1.190
Outfall composite	2/1/2001	1.180
Outfall composite	3/1/2001	0.870
Outfall composite	4/1/2001	1.150
Outfall composite	5/1/2001	1.080
Outfall composite	6/1/2001	1.360
Outfall composite	7/1/2001	0.590
Outfall composite	8/1/2001	1.250
Outfall composite	9/1/2001	0.870
Outfall composite	10/1/2001	0.590
Outfall composite	11/1/2001	1.160
Outfall composite	12/1/2001	1.360
Outfall composite	1/1/2002	1.390
Outfall composite	2/1/2002	1.360
Outfall composite	3/1/2002	1.450
Outfall composite	4/1/2002	1.450
Outfall composite	5/1/2002	1.450
Outfall composite	6/1/2002	1.120
Outfall composite	7/1/2002	1.330
Outfall composite	8/1/2002	1.430
Outfall composite	9/1/2002	0.765
Outfall composite	10/1/2002	1.120
Outfall composite	11/1/2002	0.770
Outfall composite	12/1/2002	1.450

Outfall composite	1/9/2003 AA66341	1.560	X	1.56
Outfall composite	2/6/2003 AA67303	1.450		
Outfall composite	2/19/2003 AA67738	1.180		
Outfall composite	3/12/2003 AA68438	1.620	X	
Outfall composite	3/14/2003 AA68530	1.560	X	
Outfall composite	3/21/2003 AA68752	3.040	X	
Outfall composite	3/28/2003 AA68979	1.620	X	1.96
Outfall composite	4/1/2003 AA69104	1.280		
Outfall composite	4/8/2003 AA69357	1.110		
Outfall composite	4/22/2003 AA69866	0.942		
Outfall composite	5/2/2003 AA70222	0.765		
Outfall composite	5/8/2003 AA70467	1.080		
Outfall composite	6/3/2003 AA71283	0.765		
Outfall composite	7/8/2003 AA72577	1.100		
Outfall composite	8/11/2003 AA73817	1.430		
Outfall composite	9/10/2003 AA74901	0.999		
Outfall composite	10/8/2003 AA75856	1.220		
Outfall composite	11/7/2003 AA76782	1.100		
Outfall composite	12/5/2003 AA77499	1.160		
Outfall composite	1/7/2004 AA78503	1.040		
Outfall composite	2/4/2004 AA79499	1.100		
Outfall composite	3/2/2004 AA80435	0.869		
Outfall composite	4/6/2004 AA81776	0.869		
Outfall composite	5/4/2004 AA82622	1.020		
Outfall composite	5/18/2004 AA83083	0.869		
Outfall composite	6/2/2004 AA83580	0.765		
Outfall composite	7/7/2004 AA84648	1.250		
Outfall composite	8/3/2004 AA85514	1.180		
Outfall composite	9/14/2004 AA86929	1.000		
Outfall composite	10/5/2004 AA87545	0.942		
Outfall composite	11/9/2004 AA88614	0.765		
Outfall composite	12/14/2004 AA89652	0.765		
Outfall composite	1/5/2005 AA90295	0.765		
Outfall composite	2/2/2005 AA91194	0.765		
Outfall composite	3/2/2005 AA92068	1.150		
Outfall composite	4/6/2005 AA93283	1.180		
Outfall composite	5/3/2005 AA94185	0.942		
Outfall composite	6/8/2005 AA95365	0.869		

Attachment B

Reasonable Potential Analysis

Comparison of Water Quality Objective with Effluent Data after complete mixing



UCB is Upper 95% Confidence Bound for the 95th Percentile.

Data Notes: Oceanside Acute Toxicity

N = 86 Observations with 0 % censored data, Dilution Ratio = 0, Background Conc. = 0

RPA Endpoint 2.

An effluent limitation is not required for the pollutant. Monitoring may be required as appropriate.
